SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 706

THE PITTSBURGH NATIONAL BANK, Executor of the Estate of Frank E. Mower, deceased,

Petitioner,

vs.

EQUITABLE GAS COMPANY, a corporation.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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EQUITABLE GAS COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, Pittsburgh National Bank, Executor of the Estate of Frank E. Mower, Deceased, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in its case No. 111 March Term, 1966.

Opinions Below

The opinion of the trial judge in the Court of Common Pleas of Allegheny County, Pennsylvania, is printed at pages 123-152 of the Record (as renumbered for this Court) and appears in Appendix A, pages 12 to 34, *infra*. The *en banc* opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, is reported at 114 P. L. J. 1 (1966), is printed at pages 154-178 of the Record and appears in Appendix B hereto, pages 35 to 53, *infra*. The opinion of the Supreme Court of Pennsylvania is reported at 421 Pa. 468, 220 A. 2d 12 (1966), is included in the Record

at pages 373-380 and appears in Appendix C hereto, pages 54 to 61, *infra*, and its *per curiam* order denying reargument appears in the docket entries at page 371 of the Record.

Jurisdiction

The judgment of the Supreme Court of Pennsylvania at No. 111 March Term, 1966, is contained in its opinion, Appendix C hereto, page 61, *infra*, and was entered on May 24, 1966. Petitioner's timely petition for reargument was denied on June 22, 1966, Record page 371.[1] The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Question Presented

Respondent, acting as an agency of the state under color of state law, appropriated the sub-surface property rights in land owned by petitioner's decedent in order to lay a gas transmission line. Its refusal to pay compensation therefor was upheld by the Supreme Court of Pennsylvania on the basis that an easement acquired many years before by another state agency over the surface of the land solely for purposes of public travel had grown by evolution to include the right to invade the sub-surface of the land. The question presented is whether the failure to pay compensation for this invasion of the sub-surface property rights of petitioner's decedent is repugnant to the Constitution of the United States.

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides in relevant part:

[1] This Court by order dated September 16, 1966, extended the time to file this petition to October 19, 1966.

"* * * nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Statement

This case involves rights in land in Allegheny County, Pennsylvania, owned since 1921 by petitioner's decedent.[2] The land is located in a rural area and had last been used for farming. Beatty Road, a public easement or right of way, runs across the eastern portion of the land. This road was taken over by Allegheny County in 1915, having been established some time prior thereto. It is conceded that the public easement when acquired included only the right of the public to surface passage (Appendix C, pages 56-57) and did not include the right to invade the sub-surface for the purpose of laying gas pipelines or for any other purpose.[3]

In 1956 respondent, a gas utility company, laid a 16-inch cross-country high pressure gas transmission line under the berm of Beatty Road in decedent's land. Respondent is authorized by Pennsylvania statute under certain circumstances to exercise the state's power of emient domain but it did not purport to exercise that power when it laid its pipeline. Although requested to do so, respond-

[2] The facts, which are not in dispute, are recited in the opinions of the trial judge, Appendix A hereto, the Court *en banc*, Appendix B hereto, and in the opinion of the Supreme Court of Pennsylvania, Appendix C hereto.

[3] The parties have been unable to determine whether the public easement was acquired by condemnation or otherwise. However, at the time the easement was acquired the state was not empowered to acquire the fee simple title to property by condemnation in the absence of express statutory authorization, but could only acquire the right to use the land for the purpose for which it was taken. Thus it is agreed that the state acquired only the right to use Beatty Road for the purposes of public travel.

ent refused to pay petitioner's decedent damages for the laying of a pipeline in the subsurface portion of his land.[4] Decedent brought suit in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging, among other things, that respondent had "taken his property without due process of law or making just compensation" (Record, page 7). In Pennsylvania when an entity having the power of eminent domain appropriates private property without paying compensation the property owner may elect to treat the appropriation as a taking and have damages assessed as if the action were a condemnation proceeding. Decedent so elected in this case (Appendix C, page 55).

There was no dispute among the real estate experts for both parties as to the fact that there was actual money damage to decedent resulting from the invasion of the subsurface of his land but there was a difference of opinion as to the amount (Record, pages 112-113). Following a jury verdict that the value of the rights taken by respondent was $9,700, the trial Court entered judgment for petitioner for that amount (Appendix A, page 34) which with interest totaled $14,356 (Appendix C, page 55). The Court rejected respondent's contention that petitioner was not entitled to damages as a matter of law, holding that to deny damages would violate petitioner's property rights protected by the Constitutions of the United States and the Commonwealth of Pennsylvania (Appendix A, pages 16-17). Respondent then moved the Court *en banc* for judgment *non obstante veredicto* which was denied, *inter alia*, on the ground that the failure to award damages for the intrusion into petitioner's subsurface land would constitute a deprivation of his rights under the state and federal constitution (Appendix B, pages 49-51).

[4] Petitioner is the executor of the estate of the landholder, who died prior to trial.

On respondent's appeal the Supreme Court of Pennsylvania reversed the judgment of the trial Court and entered judgment for respondent (Appendix C, page 61). The Court acknowledged that when the public easement for Beatty Road was acquired no right to lay a pipeline in the land below the road had been acquired (Appendix C, pages 56-57). But the Court said that in the intervening years gas utility lines in rural areas had become commonplace. Therefore, according to the Court, the easement acquired by the state over 50 years ago must be deemed to have grown, by evolution, to embrace the right to lay pipelines in the sub-surface; in the Court's words, "this development makes the carriage of these items along our roads a part of the main stream of commerce which is thus included within the original public easement" (Appendix C, page 60). In light of this holding the Court concluded that "the constitutional questions raised here and below are not relevant" (Appendix C, page 61).

Petitioner sought reargument before the Supreme Court of Pennsylvania, claiming, *inter alia*, that the Court had erroneously failed to decide the federal and state constitutional questions presented (Record, pages 389 *et seq.*) The petition was denied without opinion (Record, page 371),

Reasons for Granting the Writ

1. Property owners' rights in the sub-surface of their land are fully entitled to constitutional protection. If the state wishes to convert the sub-surface of private land to a public use, it must pay for the right. The State does not obtain the right to use the sub-surface merely by acquiring surface rights in the land. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922). As Mr. Justice Holmes wrote for the Court in *Mahon*, if the state has acquired

> "only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much." 260 U. S. at 416.

These well accepted principles were not expressly contravened in the opinion of the Court below. Rather, the Court sought, unsuccessfully we submit, to avoid the application of these principles by attempting through a judicial change in existing state law to alter retroactively the scope of the original public easement acquired by the state.

The Court was aided in its effort by an old doctrine, first announced in *McDevitt v. People's Natural Gas Co.*, 160 Pa. 367, 28 A. 948 (1894), that the acquisition of a public easement in a city or borough brings also to the state the right to use the sub-surface as well as the surface for any public service. By virtue of this doctrine, the state is required when it acquires a public easement in a city or borough to pay compensation for the additional rights acquired and the Supreme Court of Pennsylvania has so ruled. *46 S. 52nd St. Corp. v. Manlin*, 398 Pa. 304, 157 A. 2d 381 (1960). However, petitioner's land was not located in a city or borough when it was acquired. It was located in a township, as to which the law has always been, until now, that a public easement brings *only* the right to use the surface for the purpose of public passage. *Sterling's Appeal*, 111 Pa. 85, 2 A. 105 (1885). In line with this rule the Supreme Court of Pennsylvania has announced that when the state acquires a public easement in a township it pays only for the right of passage. *Duquesne Light Co. v. Duff*, 251 Pa. 607, 97 A. 82 (1916).

In the decision below the Court overruled *Sterling's Appeal* and held that henceforth public easements in townships would be treated no differently than public easements in cities and boroughs—in all cases the easement would bring the right to use the sub-surface and surface of the land for any public service. Presumably this will mean that in the future compensation in township condemnation cases will be paid for the right to use the land for any public service.

Whatever the wisdom of the Court's announcement of a new rule for future acquisitions, its serious error was in applying the new doctrine to a public easement acquired when the old rule obtained, for the effect of this application is to enlarge retroactively the public easement in petitioner's land without compensating petitioner for the increased appropriation of property rights. This, we submit, the Court could not do, consistent with the federal constitutional provision on taking of private property and the decisions of this Court in *Pennsylvania Coal Co. v. Mahon*, *supra*, and other cases.

Just as the state may not appropriate property rights in the air space above the surface of land without payment of just compensation (*Griggs v. Allegheny County*, 369 U. S. 84 (1962); see *United States v. Causby*, 328 U. S. 256 (1946)), neither may it appropriate sub-surface rights without payment. While concededly the state at one time acquired some rights to use the surface of petitioner's land, "by constitutional standards it did not acquire enough" to permit use of the sub-surface without payment of compensation therefor. *Griggs v. Allegheny County*, *supra*, at 90.

All would surely admit that the state could not retroactively enlarge its public easement horizontally, with-

out payment of additional compensation to the land owners, merely because the needs of the public required a wider highway. Similarly, a public easement cannot be retroactively extended vertically without paying for the newly obtained property rights. Yet it is just such a retroactive vertical enlargement of a public easement without payment that the court below countenanced.

2. The retroactive enlargement of public rights in private property sanctioned by the court below promises to be widely practiced unless this Court declares it to be beyond the limits of the Constitution.[5] With the nation's attention now focused sharply on the need for beautification of the countryside and elimination of urban blight, authorities with increasing frequency are turning to the use of the sub-surface of land for transportation systems, fuel transmission lines, television, electrical, and telephone cable, and the like. These underground facilities represent a means of accommodating the demand for the most modern and efficient public services with the equally important need to conserve the country's landscape. The decision below bears importantly on achievement of national beautification because it radically alters the means by which this objective will be financed. By emasculating constitutional provisions preventing the taking of private property without just compensation, the decision below, if generally followed, would place the burden of paying for national beautification in great part on a relatively few prop-

[5] It appears that in most of the states public highway easements permit intrusion onto private property solely for the purpose of public travel and purposes incidental thereto. All other rights to use the property remain in the fee owner. 25 Am. Jur., Highways, §§ 132-136, 155, 163. Some of these states are: Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Kansas Kentucky, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia.

erty holders rather than the government bodies or utility companies who are in a position to pass on the costs to the general public—the real beneficiary of the beautification effort.

Because the decision below is a major departure from accepted constitutional doctrine; because it shifts the financial burden of public improvements from the general public to private landholders; and because the interest taken in the case by utility groups and government officials suggests that the technique employed by the utility company and sanctioned by the court below in this case could become widespread,[6] an important question of general significance is presented that this court should resolve.

3. The decision below does not rest on an independent and adequate state ground. Contrary to the court's belief, its overruling of longstanding state doctrines did not avoid the deprivation of federal constitutional rights inherent in its denial of damages to petitioner, as explained above and as pointed out in the petition for reargument filed below. Given the concession that compensation for the subsurface rights appropriated by respondents was not paid when the public easement was acquired, the court could not properly avoid the question whether petitioner's property rights could be taken retroactively without compensation consistent with the Federal Constitution.

Nor can it be said that the statement of the court below that a public road is always established "for the purpose of public travel and commerce," coupled with its conclusion that the carriage of gas in pipelines along roads is "a part of the main stream of commerce," affords an inde-

[6] Briefs *amici curiae* were filed in the Pennsylvania Supreme Court on behalf of the Pennsylvania Municipal Authorities Association, the Pennsylvania Electric Association, the Pennsylvania Gas Association, and the National Water Company Conference.

pendent basis for its decision. The fact that gas transmission is commerce and that roads are acquired for the purpose of furthering movements in commerce does not mean that the state may invade subsurface rights to move the commerce without paying compensation when only surface rights have been lawfully acquired.[7]

The decision below cannot be explained in any way except as a holding that a public easement may be enlarged retroactively without payment of compensation to embrace rights in private property not previously paid for. Because this holding is so contrary to the constitutional requirement of just compensation for a taking of private property, review by this Court is necessary.

---

[7] In 1951, subsequent to the acquisition of the public easement on petitioner's land but prior to respondent's installation of the gas pipeline, Patton Township, the site of the land, was incorporated into Monroeville Borough. The Court below briefly alluded to a 1917 textbook for the proposition that,

> "in a case as here present, the test to be applied is the governmental character of the area when the pipeline is laid, not the character when the road was established. See, I Nichols, Eminent Domain, 476 (2d Ed. 1917). The rationale is that the citizens consent to the additional servitude when they change the governmental nature of the area."

Clearly the Court did not purport to rest its decision on this ground, and in any event the ground would not be independent of the constitutional contention, for the constitutional requirement of payment cannot be avoided by a change in political status of the area where the land is located, at least absent some showing, not made here, that the particular landowner involved consciously supported the change knowing that it would result in a limitation of his property rights.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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October 1966.

Appendix A

OPINION

SMITH, J.

The instant case is an action of trespass brought by the plaintiff, representing the interests of deceased property owners, against the defendant, Equitable Gas Company, a public utility corporation, for damages which plaintiff alleges to have sustained as the result of an unlawful trespass by the defendant upon its property.

On November 9, 1956, and until February 24, 1961, Frank E. Mower and Viola B. Mower, his wife, were the owners in fee as tenants by the entireties of certain property situate along Beatty Road, in the Borough of Monroeville which, prior to 1954, [*sic*, should be 1951] was the Township of Patton, Allegheny County, Pennsylvania. The extent and description of the property which the Mowers owned is not in issue and has been stipulated to by the parties. Viola B. Mower died on February 24, 1961. Frank E. Mower died prior to trial. Pittsburgh National Bank, the present plaintiff, was substituted as plaintiff in its capacity as executor of the Estate of Frank E. Mower, deceased.

When the case came before the writer of this opinion and a jury for trial, it appeared from the uncontradicted, uncontroverted evidence offered by both the plaintiff and the defendant, that there were only three issues involved. Of the three, only one required a determination by the jury. The issue which required a jury finding involved the question of damages, if any, to the property of the plaintiff's decedent. In accordance with the instructions which the Court gave, the jury returned a special verdict that the damage to plaintiff's decedent's property was $9,700.00.

The other two issues were exclusively issues of law. They were:

(1) What was the extent of the right-of-way of Beatty Road?

(2) If the gas line of the defendant company was installed under the right-of-way of Beatty Road, even though it be within the property of the plaintiff's decedent, is plaintiff-executor entitled to damages as a matter of law?

On the first issue, the Court ruled that the right-of-way of Beatty Road was thirty-three (33) feet in width and that at all places the gas line of the defendant utility company was installed under the right-of-way of Beatty Road traversing plaintiff's decedent's property. This is in keeping with the allegation contained in plaintiff's complaint in Paragraph 7, wherein plaintiff alleged as follows:

> "7. Said pipeline was installed within the right of way condemned by the County of Allegheny over Plaintiff's property for road purposes only while the subject property was within the limits of Patton Township, Allegheny County, Pennsylvania. The aforesaid condemnation was under the authority of the Act of May 11, 1911, on or about February 27, 1915, at No. 1 January Sess. 1915, Quarter Sessions Court of Allegheny County which by reference thereto is made a part hereof."

The last issue which the Court reserved for determination as a matter of law, was the question of whether or not plaintiff is entitled to a judgment for compensatory damages because of an additional servitude imposed upon the property of the plaintiff's decedent when the pipe line of the defendant utility was constructed within the bounds of the Beatty Road right-of-way traversing its property.

If the Court finds that plaintiff, as a matter of law, is entitled to damages, then judgment should be entered in favor of the plaintiff and in keeping with the jury's special verdict in the amount of $9,700.00. If not, judgment should be entered in favor of the defendant against the plaintiff.

The facts which are necessary to a proper determination of the remaining question of law are not in dispute and a summary of them may easily be gleaned from the uncontroverted, uncontradicted evidence presented both by the plaintiff and the defendant. These facts are as follows: At the time of the alleged trespass to plaintiff's decedent's property, the decedent owned 15.379 acres in the Borough of Monroeville, Allegheny County, Pennsylvania. On the easterly portion of this property, there is a County road which runs for a distance of approximately 2,016 feet along the property, the paved portion of which, with a very minute exception traverses the property of plaintiff's decedent. The westerly portion of the right-of-way, which is more extensive than the paved portion of the road itself, is within plaintiff's decedent's boundaries.

Neither party disputes this fact.

Beatty Road, itself, has existed for many years. No evidence has been offered, and both parties have agreed, that they are unable to determine whether the Beatty Road right-of-way came into being as the result of a condemnation proceeding, a dedication, or as the result of usage over the many years. The only record that can be found regarding Beatty Road is a proceeding in the Quarter Sessions Court of this County at No. 1 January Sessions, 1915, wherein the County of Allegheny took over Beatty Road for maintenance in accordance with the action of the Grand Jury of this County. That proceeding was offered

in evidence, but did not disclose by metes or bounds the exact extent of the right-of-way of Beatty Way (as it was then known) as it existed prior to 1915, nor as it was contemplated to exist. However, the proceedings do show that the road was in existence as of 1915.

For many years prior to 1915 and up to 1954, the location of the decedent's property and that portion of Beatty Road which is material to this case were located in what was the *Township* of Patton, *a rural, undeveloped area.* In 1954 the Township of Patton became the Borough of Monroeville. At no time did the Borough of Monroeville take over Beatty Road and, from 1915 until this date, it has remained, and presently is, a County road.

Commencing some time in the latter part of 1956 and extending through the early part of 1957, the defendant installed a sixteen inch distribution line through the Borough of Monroeville. A portion of this line was installed along the westerly side of the paved portion of Beatty Road, underneath the right-of-way for Beatty Road and in the property of the plaintiff's decedent for a distance of approximately 2,016 feet. The pipe line was installed so that the top of the line was thirty-six (36) inches below the surface of the ground and it was constructed so that the pipe would have a maximum volume of 70,000,000 cubic feet of gas per day. It could withstand 500 pounds per cubic foot of pressure at its maximum, 200 pounds per cubic foot of pressure as an average, and the minimum pressure was to be 10 pounds per cubic foot.

The line was installed to serve the customers of the defendant. This would include customers in the Borough of Monroeville and in the vicinity of the property in question.

While the defendant obtained a permit from the County of Allegheny for the opening of the berm of the road for the purpose of installing this pipe line, it did not obtain the permission of plaintiff's decedent. It did not exercise its power of eminent domain, nor did it begin to do so by the posting of a proper bond. At no time did the defendant secure the consent of the Borough of Monroeville.

It is the contention of the plaintiff that defendant has trespassed upon decedent's property and has appropriated for its own use a portion of this property for the installation of its 16-inch gas main and, in doing so, defendant has obligated itself to pay compensation by way of damages to the plaintiff for the taking. At the time of the trial, plaintiff elected to consider the taking of the property by defendant as a complete appropriation and elected to have the damages determined as if this were an eminent domain proceeding.

On the contrary, it is the contention of the defendant that it has the right to install gas lines within the right-of-way of public roads located within the Borough of Monroeville without paying compensation to the owners of the property.

One of the most fundamental and rudimentary principles of law in our system of jurisprudence is that private property cannot be taken by the Government or by any entity, even though vested with the power of eminent domain, without paying just compensation or the securing of just compensation therefor. This principle is recognized both in the Constitution of the United States of America and that of the Commonwealth of Pennsylvania.

The Constitution of the United States of America provides as follows:

Amendment V:

"* * * nor shall private property be taken for public use without just compensation."

Amendment XIV:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

The Constitution of the Commonwealth of Pennsylvania, Article I, Section 10 provides as follows:

"Private property shall not be taken or applied to public use, without authority of law and without just compensation being first made or secured."

In the case of Lance's Appeal, 55 Pa. 16 (1867), the Supreme Court of this Commonwealth stated, at page 26, that:

"The exercise of the right of eminent domain, whether directly by the State or its authorized grantee, is necessarily a delegation of private right, and the rule in that case is, *that the authority is to be strictly construed*: Dwarris on Stat. 750; 2 Casey 355, 3 Id. 339; 7 Harris 211". (Emphasis supplied)

In the case of Winger v. Aires, 371 Pa. 242, 244 (1952), our Supreme Court stated:

"There is no authority under our form of Government that is unlimited. The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review. The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land."

One need not read far in the annals of American Jurisprudence to become aware of the sacred position in which

the law places the private property of an individual. Before this right may be transgressed with impunity, the transgressor's right to do so must be clear and not subject to dispute.

In the instant case, there is not one iota of doubt that the defendant did trespass upon the property of the plaintiff's decedent without permission and without exercising its legal right of eminent domain. The sole question remaining for this Court to determine is whether or not that trespass was justified in law so as to render the defendant blameless for the injuries which the jury found the plaintiff suffered. The justification which defendant has offered is based upon the fact that the property over which the pipe line was laid was subjected to a right-of-way for a County road by authority of the action of the Grand Jury of this County while the property was located in the then rural Township of Patton.

In 1954, prior to the installation of the gas line, the Township of Patton became the Borough of Monroeville. It is defendant's contention that the area became urbanized thereby, and that they had the right, with the consent of the County for the opening of the road, to install the pipe line without incurring liability to the plaintiff for damages.

In Sterling's Appeal, 111 Pa. 35 (1885), a landowner brought an action in equity to restrain the defendant, a gas utility company, from laying a pipe line for the transportation of natural gas under a public road traversing his property. In ruling in favor of the property owner, the Supreme Court stated, at pages 40 and 41, that:

> "But conceding for the sake of argument, that the company has power under its charter to do the acts complained of in the bill and admitted by the

demurrer, has it a right to proceed without first making or securing compensation to appellant? We think not. As owner of the land traversed by the public road, he has a right to use it and the land on which it is located for any purpose that will not impede or interfere with the public travel. By appropriating land for the specific purpose of a common highway, the public acquires a mere right of passage with the powers and privileges incident to such right. The fee still remains in the land owner notwithstanding the public have acquired a right to the free and uninterrupted use of the road for the purpose of passing and re-passing; and he may use the land for his own purposes in any way that is not inconsistent with the public easement. He may, for example, construct underneath the surface passage ways for water and other purposes, or appropriate the subjacent soil and minerals, if any, to any use he pleases, provided he does not interfere with the rights of the public. In other words, *the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be free and open for public use as a highway.* It is in view of this servitude that damages may be awarded to the landowner. Laying and maintaining a pipe line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authority, when the land was appropriated for the purpose of a public road. It is a burden, moreover, which to some extent, at least, abridges the rights of the landowner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision requiring just compensation to be made

for property taken, injured or destroyed. (Const. Art. XVI., Sec. 8) In some cases it is possible the injury may be consequential as well as direct. The constitutional provision embraces both." (Emphasis supplied).

Nine years after the Sterling case, *supra,* the Supreme Court had for its consideration the case of McDevitt v. Gas Co., 160 Pa. 367. (1894). In the McDevitt case the gas company contemplated laying its lines under sidewalks traversing the plaintiff's property on Forbes Street in the *City* of Pittsburgh. In ruling that the gas company could install their lines under the sidewalks in the *private property* of the plaintiff, the Court stated, at pages 373 and 374:

"Whenever it leaves the street and enters the private property of an individual, then the duty to negotiate with the owner arises; since entry upon and occupation of private property must be under authority derived from the owner. Forbes street was a city highway, and *subject like all other streets in a city to urban servitudes for the benefit of the public. In land taken for a highway in the country, the easement acquired by the public is only for the purpose of a way over the surface.* For all other purposes the land may be occupied by the owner so long as the public easement is not disturbed. We accordingly held in Sterling's Appeal, 111 Pa. 35, that the maintenance of a pipe line under such a highway imposed an additional servitude upon the land. It may be a very slight one, but to some extent it abridges the rights of the landowner in the soil. Our brother Sterrett said in that case: 'As to streets and alleys in cities and boroughs, there are reasons why a different rule to some extent should prevail.' These reasons are obvious. The necessity for drainage; for a water supply; for gas

for purposes of lighting; for natural, or fuel gas, for heat; for subways for telegraph and other wires; and for other urban necessities or conveniences, *give to the municipality a control over the subsurface* that the township has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land. But its situation may subject it to a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country. The city has the right to use the streets and alleys to whatever depth below the surface it may be desirable to go, for sewers, gas and water mains, and any other urban uses. In taking the streets for these necessary or desirable purposes it is acting not for its own profit but for the public good. It is the representative of the inhabitants of the city, considering their health, their family comfort, and their business needs; and every lot owner shares in the benefits which such an appropriation of the streets and alleys confers. If the city abridges his control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from an abundant water supply, from the general distribution of gas, and the like. *The disturbance of the owner's control over the subsurface of the streets is in a legal sense an invasion of his rights, but it is damnum absque injuria.*" (Emphasis supplied.)

It is indeed odd and disturbing to find a Pennsylvania Court saying that, "the disturbance of the owner's control over the subsurface of the streets is in a legal sense an invasion of his rights, but it is *damnum absque injuria*". An invasion of a right without redress? Injuries without damages?

This would appear to be in conflict with Article I, Section 11, of the Constitution of this Commonwealth which provides that:

> "All courts shall be open; *and every man for an injury done him in his lands,* goods, person or reputation *shall have remedy by due course of law.* * * *" (Emphasis supplied)

However, one may find consolation in the assumption or presumption that when the city condemns for street purposes, it is then understood that it will be subjected to later additional servitudes and damages are assessed at the time of the original condemnation with this in mind. Only by making this assumption or presumption could a court conclude that some property rights are less sacred, or that the owner is not entitled to compensation when such rights are later taken.

In 1916, one year after the county took over the Beatty Road involved in the instant case, the Supreme Court decided the case of Duquesne Light Co. v. Duff, 251 Pa. 607 (1916). In that case (at page 608), the Court declared the issue to be as follows:

> "The sole question in the case is whether an electric light company, having a contract with the commissioners of a township of the first class to light its highways has the right to place its poles and wires upon the highways for such purpose without the consent of the abutting owners."

It held that (at page 609):

> "There is, however, no conflict in our own decisions and the principle is announced and has been consistently adhered to that *the only servitude imposed on land appropriated for a rural highway is the right to construct and maintain a safe and convenient roadway thereon,* and that the public acquires a mere right

of passage with the powers incident to such a right. *The owner in such cases retains the fee* and may use the land for any purpose not inconsistent with the easement acquired by the public. *Damages are assessed solely on the ground that the easement thus acquired is the only servitude imposed on the land.* We have accordingly held that laying and maintaining a gas line at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, *where the land was appropriated for the purpose of a public road:* Sterling's App., 111 Pa. 35. We applied the same principle in Penna. R. R. Co. v. Montgomery County Pass. Ry. Co., 167 Pa. 62, where we noted the distinction between the servitude imposed on land taken for a city street for which compensation need not be made or secured, and the additional burden imposed on a rural highway for which the abutting owner must be compensated; and held that until there was legislation authorizing it, a street railway could not be constructed upon such highway without the consent of the abutting owners. (Emphasis supplied.)

In the Duquesne Light Company case, *supra,* the utility argued that, because of a change in the classification laws regarding townships, the Court should find a greater authority to use the highways for utilities. In partial answer to this, the Supreme Court stated at page 611, that:

"When land is taken for a rural highway, the only servitude contemplated by the public authorities and the owner is the well understood burdens of a right of passage by the public with its incidental powers, and damages are awarded the owner for the imposition of that *and no other servitude upon the land.* That

appropriation of land for a highway is a taking for public use within the intendment of the Constitution, and *if any additional servitude is created other than the one originally imposed it must be with the consent of the owner or for compensation made or secured to him.*" (Emphasis supplied.)

See also Bell Telephone Company of Pennsylvania v. North, 24 D. & C., 2d 1 (1960).

In the instant case, it must be remembered that Beatty Road was a *rural* highway in Patton *Township* when the County took it over in 1915. Whether it came into existence by condemnation, dedication or use, it was contemplated to be used only for the right of passage by the public.

In the case of 46 S. 52nd St. Corp. v. Manlin, 398 Pa. 304 (1960), the plaintiff brought an action in equity to enjoin the operation of a newsstand on the sidewalk traversing its property. The Court held that the plaintiff was entitled to protection and stated (page 311):

"The theory upon which plaintiffs sought relief in equity was that defendant's operation of the newsstand constituted both a trespass and a nuisance. It appears from the record that 52nd Street was originally dedicated to public use in 1854 by deed of dedication and in 1901 was widened as the result of condemnation proceedings. The newsstand appears partly on that land which was acquired by deed of dedication and partly on that part of the highway which was acquired by condemnation. In either case, the City did not acquire title to the fee."

and at page 312:

"While the *easement acquired by the public in country roads is an easement of passage only,* this is not true in Pennsylvania with respect to the *public*

right in the streets of a city. These are regarded as in the exclusive possession of the municipality, which may authorize the use of a sidewalk, as well as the street, for any public service, without further compensation to the abutting lot owners."

and at page 313:

"* * * As stated by the Supreme Court of the United States in Hague v. C. I. O., 307 U. S. 496, 515-516, 83 L. Ed. 1423, 59 S. Ct. 954 (1939): 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places, has from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.' "

And at page 315:

" 'The *highways belong to the commonwealth* in trust for the great body of the people, *and he who claims a peculiar privilege to invade them must establish his right under some statute, or valid municipal regulation, ordained in pursuance of statutory authority.* * * * * * (Emphasis supplied)

"Subject to the paramount authority of the Commonwealth, the regulation and control of the streets belong to the city government."

And at page 319:

"As we have stated, plaintiffs, as fee-owner of the sidewalk, are entitled to possession free and clear of any encroachments. Plaintiffs' right, of course, is subject to the public easement and the right of the municipality to relinquish their easement for a public as distinguished from a private use. To so relinquish the public easement, however, it is only proper that we require the relinquishment to be done expressly and not by inference. Such authorization was clearly granted by ordinance in Pickup v. Philadelphia & Reading Ry. Co., 29 Pa. Superior Ct. 631 (1905). Such authorization was not present in Thomas v. Inter-County Street Ry., *supra*."

In his Concurring and Dissenting Opinion, Mr. Chief Justice Bell stated, at pages 324 and 325, as follows:

"One of the most important and fundamental rights ordained and guaranteed by the Constitution of Pennsylvania and by the Constitution of the United States is the inherent and indefeasible right to acquire, possess and protect property; property cannot be taken for public use without the payment of just compensation: Article I, Sec. 1 and Sec. 10; Article XVI, Sec. 8 of the Constitution of Pennsylvania, Fifth and Fourteenth Amendments to the Constitution of the United States. It is indisputable that (in Pennsylvania) an owner of property abutting on a public street owns to the center of that street (in the absence of a specific vesting of a fee in the City by grant, purchase or condemnation) including, of course, the sidewalk. The owner's property rights therein and thereto are subject only to a *public easement of passage*, and a reasonable and valid exercise of the police power in the *public* interest.

* * * * *

"When we draw back all the glittering tinsel with which this case has been draped, we discover that defendant Manlin and the newspublishers (*amici curiae*) contend that 'public convenience' or 'public necessity' as well as Freedom of the Press gives a squatter and a trespasser an exclusive monopolistic and permanent right to erect and maintain on the sidewalk of another man's property—without consent or compensation—a large permanent newsstand. We often forget that newspapers are privately owned, privately published, and are operated for private profit. They are a private convenience, not a public necessity, and in virtually every instance are permitted by the consent of the owner of the sidewalk."

In McCandless Township's Appeal, 409 Pa. 283 (1962), water lines were constructed entirely within the public streets by the West View Water Authority under a contract with McCandless Township. The installation of the line was approved by ordinance of the Township. The Court stated at pages 284 and 285:

"It is to be noted that in the case at bar, since the water lines were constructed entirely within the public streets, there were no damages involved."

The McCandless case again came before the Supreme Court for further consideration, 414 Pa. 168 (1964) and again the Court stated, at page 170, footnote 2, as follows:

"Since the water lines were installed entirely within the confines of public highways no right-of-way damages are involved."

However, the quoted portions of the Court's opinion in the McCandless case were *obiter dicta* since this question was not before the Court. Moreover, such a ruling flies in

the face of all other Supreme Court decisions relative to townships or rural areas.

The case of York Tele. Co. v. Keesey, 5 Pa. Dist. 366 (1896) dealt with the erection of telephone poles in the *City* of York *with permission of the city.* In that case, the Court stated:

> "The poles and wires of a telephone company impose no additional servitude upon the street. The rights of owners of property abutting on a public street are subject to the paramount rights of the public which are not limited to a mere right of way, but extend to all beneficial legitimate street uses, of which this is one."

From an examination of the cases cited *supra* and other cases cited to us by counsel, there appear to be two rules which the Court is to apply depending upon the factual circumstances:

1. THE URBAN RULE:

In order for a public utility to install lines, conduits or other public improvements in a public street or right-of-way which traverses private property without incurring liability to the private owner to compensate therefor, it must be determined that the installation is:

1. made with the consent or under the control of the proper municipal body, and
2. for a public purpose, beneficial to the municipality and its inhabitants, and
3. within the scope of the corporate powers of the public utility as delegated to it by the legislature; and
4. in an area sufficiently urbanized that it may be presumed that the property was to be subjected to the

imposition of subsequent additional servitudes when it was originally condemned or dedicated.

2. The Rural Rule:

Where land is either dedicated or condemned for a public street or right-of-way in a rural area, the only servitude imposed upon it is the right of the public to construct and maintain thereon a roadway which at all times shall be free and open for the passage of the public.

When a public utility wants to install lines or conduits in a right-of-way which traverses private property in a rural area, the utility must obtain consent or permission of the owner or exercise its power of eminent domain. The installation is an additional servitude imposed on the right-of-way which amounts to an appropriation for which just compensation must be provided to the private owner.

This case seems to be one of first impression in one respect. In the instant case, when the road was taken over by the County, it was then located in the rural Township of Patton, but at the time of the taking by defendant, the area had become a borough; partially rural and partially urban. The plaintiff's property is located in the rural area.

There appears to be no argument by either party that, if the pipe line in the instant case had been installed three (3) years previously, the plaintiff's decedent would have been entitled to compensation because the land would have been located in a "rural" township.

We are then presented with the question of whether or not the vested rights of the property owner, as recognized by the Rural Rule can be divested without compensation by the mere changing of the corporate form of the municipality from a township to a borough. We think not! The

constitutional provisions relative to taking of property are too important to permit such tampering.. We subscribe to the words of Mr. Chief Justice Bell in his Concurring and Dissenting Opinion in the 46 S. 52nd St. Corp. case, cited *supra,* when he quoted the following with approval:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change: Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416: Lord Appeal, 368 Pa. 121, 130, 81 A. 2d 533".

Moreover, if we were to apply the Urban Rule, we would still have to reach the same conclusion. This is true because the defendant failed to obtain the approval of the Borough for the installation of the pipe lines. In all of the cases in which the Urban Rule has been applied, the Court stressed the necessity of the municipality controlling the use of its streets and made consent a prerequisite. There being no consent, the installation was without color of law or right and hence illegal. Being illegal, it is a trespass on the plaintiff's property.

In the instant case, the defendant received a permit from a clerk[8] in the works department of the county *to open the surface* of the right-of-way for the purpose of installing its pipes. Is this sufficient? We think not! When the County took over the road in 1915 for the purpose of maintenance, it acquired an easement for the right-of-way purposes and nothing more: Sterling's Appeal, *supra,* Duquesne Light Co. v. Duff, *supra.* It did not receive the fee which remained in the property owners.

[8] Since we feel that this permit does not vest in the defendant any interest in plaintiff's property so as to permit it to install or maintain its pipe lines, we have not explored the issue of whether authority to do so must be given by ordinance of the County Commissioners.

Having only a right-of-way over the property for the purpose of travel, it cannot give to the defendant an easement for the purpose of installing and maintaining utility lines. It is axiomatic that what the County does not own, it cannot give away.

Moreover, defendant being a natural gas company, it is, as defendant itself states, bound by the Act of May 29, 1885, P. L. 29, Sec. 1, as amended, *et seq.*, 15 P. S. Sec. 1981, *et seq.* It has no other powers or rights than those set forth. Section 1 of the Act, as amended, 15 P. S. Sec. 1981, gives it power, *inter alia:*

> "Fifth * * * to have and possess the right also to enter upon, take and occupy such lands, easements and other property as may be required for the purpose of laying its pipes for transporting and distributing gas."

Section 10 of the Act, as amended, 15 P. S. 2031, gives defendant the right of eminent domain and states that this right:

> "* * * shall include the right to appropriate land upon or under which to lay said lines and locate pipes upon and over, under and across, any lands, rivers, streams, bridges, *roads, streets, lanes, alleys, or other public highways* * * *." (Emphasis supplied).

However, as a qualification to defendant natural gas company's laying pipe lines, the general constitutional requirement that it pay compensation for the property taken is implicit in the Act.

Art. XVI, Sec. 8, of the Pennsylvania Constitution provides:

> "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for

property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

Hence, even if the Court were not to imply that there would have to be just compensation under the corporations law regarding Natural Gas Companies, there exists an express constitutional mandate for just compensation which must be obeyed.

Section 11 of the Act, 15 P. S., Sec. 2035, deals with the right to use *city streets.*

Section 13 of the Act, 15 P. S. Sec. 2037 provides as follows:

"Companies incorporated under this act, and not referred to or included in the next succeeding section hereof, shall not enter upon or lay down their pipes or conduits on any street or highway of any borough or city of this commonwealth, without the assent of the councils of such borough or city, by ordinance, duly passed and approved."

In the instant case, the defendant did not obtain the prerequisite approval of the Borough of Monroeville. Therefore, its conduct in installing the pipe line was *ultra vires* and not *de jure.*

To permit a private corporation to invade what has been traditionally recognized as private property with impunity is, in effect, to grant to it a judicial subsidy on the one hand, and to sanction a judicial condemnation of the owners' property without just compensation being paid on the other. This would permit a contravention of the Constitution of Pennsylvania.

Such a result, the Court cannot, nor should it sanction.

To establish and then enforce a doctrine of judicial subsidy for public utilities which would permit them to traverse private property over or under a public road could conceivably lead to untold confusion in the law and cause unjust hardship and unnatural, unconstitutional deprivation of private rights.

If a utility may invade private property to a depth of from three to five feet for a pipe line, why not twenty, fifty or a hundred feet for a subway or storage tanks, or even an underground parking facility. One's imagination need not be vivid to picture an invasion of the air rights of the fee owner over a public road for a monorail. The infringement of the owner's rights could be limitless under such a doctrine.

Moreover, one wonders what would happen under such a doctrine of judicial subsidy, where the utility is permitted to install its lines in the private property of another, merely because the private property is traversed by a public road and receives the grace of the sovereign. What would happen if the government should abandon the road completely, or relocate substantial portions and thus effect a *pro tanto* abandonment? It is hornbook law that the easement or right-of-way would be extinguished and the fee of the owner would henceforth be unencumbered. What then would be the utility's justification to have its lines in the private property? None! It would be a bare trespasser, stripped of its judicial color or right.

See Mallory v. Bradford, 1 Pa. Dist. R. 670 (1892).

It is the opinion of this Court that defendant did illegally and unlawfully enter upon and appropriate property of the plaintiff and is, therefore, liable to respond in damages. The jury having determined the damages to be

$9,700.00, judgment will be entered for the plaintiff in that amount.

ORDER OF COURT

And now, to-wit February 23, 1965, after hearing testimony in the above entitled action in open Court and after consideration of the oral testimony and briefs of counsel, IT IS ORDERED, ADJUDGED AND DECREED that the verdict in the sum of Nine Thousand Seven Hundred ($9,700.00) Dollars in favor of plaintiff be filed of record and judgment may be entered thereon upon payment of costs.

BY THE COURT,
R. H. S. JR.

Eo die, Exception noted and bill sealed.

RALPH H. SMITH, JR. (SEAL)
Judge.

Appendix B

IN THE
COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

THE PITTSBURGH NATIONAL BANK, Executor of the Estate of FRANK E. MOWER, deceased,

vs.

EQUITABLE GAS COMPANY, a corporation.

No. 1173 April Term 1961.

Before: Smith and Wessel, *JJ.*

OPINION.

SMITH, *J.*

The defendant's motions for a new trial and judgment *n. o. v.* present for our consideration two issues:

(1) May the defendant, a public utility corporation, lay its pipe line in the property of the plaintiffs, private citizens, without being liable for damages where the pipes are laid under land which is encumbered by an easement for a county road, and

(2) Was the award of damages contrary to law?

The plaintiff's predecessors in interest were citizens of the United States of America and of this Commonwealth, who acquired title to land when it was located in the then

rural Township of Patton, Allegheny County, Pennsylvania.

The defendant is a corporation for profit created under and by virtue of the Act of May 29, 1885, P. L. 29 Sec. 1, *et seq.*, as amended by the Act of June 24, 1939, P. L. 869, Sec. 1, *et seq.*; 15 P. S. Sec. 1981 *et seq.* One of its prime functions and one for which it has been chartered is the distribution of natural gas to its customers via pipe lines. These pipe lines are laid either in or over land and constitute one of the most valuable assets of the defendant corporation. In order to lay its lines in or over land, it must first acquire the legal right to do so or otherwise it will be considered a trespasser.

Defendant, being a natural gas company, as defendant itself states, is bound by the Act of May 29, 1885, cited *supra*. By virtue of Section 1 of this Act (15 P. S., Sec. 1981), the defendant has the power to:

> "Fifth. To hold, acquire, purchase, take, receive, maintain, lease, own and use, mortgage, sell, and transfer such real and personal property including pipes, tubing, tanks, office and such other machinery, devices or arrangements, situated in or out of this Commonwealth, as the purposes of the corporation requires, to purchase, take, acquire, own, hold and use, the rights, franchises, property and privileges of any other natural gas company incorporated under the laws of this Commonwealth or of any other state or commonwealth, so that all the property rights, powers, franchises and privileges, then by law vested in such other corporation, shall be transferred to and vested in the corporation purchasing, taking, or acquiring the same and to have and possess the right also to enter upon, take and occupy such lands, easements and other prop-

erty as may be required for the purpose of laying its pipes for transporting and distributing gas."

Section 10 of the Act of 1885,[9] *supra*; 15 P. S. sec. 2031 states that this right of eminent domain:

> "* * * shall include the right to appropriate land upon or under which to lay said lines and locate pipes on and over, under and across, any lands, rivers, streams, bridges, roads, streets, lanes, alleys, or other public highways, * * *."

Sections 11 and 13 of the Act of 1885, cited *supra* (15 P. S. Secs. 2035 and 2037 respectively) further deal with the right of defendant to acquire rights of way for laying pipe lines. Section 11 explains how the right to use streets or public ways may be exercised by a natural gas company. Section 13 states the regulations upon this right of such a company to enter upon the public ways of any street or highway or boroughs or cities of this Commonwealth in order to lay down its pipes or conduits.

In the instant case, plaintiff contends and the defendant admits that the right to lay the pipe line in the private property of the plaintiff was not acquired by the exercise of the power of eminent domain; by devise; by gift; by purchase; by adverse use, or by prescription. The defendant does not, nor can it, point to the Constitution or an act of the legislature to justify its acquisition of a valuable asset, to-wit, the right to lay its pipe line in the property of the plaintiff.

The facts of the instant case are more fully set forth in the opinion of the Trial Judge, but for the purpose of this

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[9] This section of the Act of 1885 must be read in light of Article XVI, Section 8 of our Constitution, which provides that:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

opinion it is sufficient to note that the defendant justifies its right to invade plaintiff's property on the fact that the property in which the line is laid is traversed by a county road and that both the road and property presently are situate within the Borough of Monroeville. To support the acquisition by the defendant of his right[10], and the divestiture of the plaintiff of its right, the defendant has cited to this Court a myriad of authorities based upon judicial decisions. If defendant has acquired this right, it must be strictly based upon judicial fiat and not on some acts of the County.[11]

Pennsylvania has two separate rules which have been enunciated by our Supreme Court. Defendant has categorized them as follows:

(1) The rule dealing with townships, and

(2) The rule dealing with cities, towns and boroughs.[12] Both rules have a common origin! They were both conceived in *Sterling's Appeal,* 111 Pa. 35 (1885). The "township rule" was a legitimate child; the "city and borough rule", an illegitimate child.

In *Sterling's Appeal,* decided in 1885, the Supreme Court had before it the issue of whether or not a natural gas company could install its pipe lines in the private property of another which was located in and traversed by a road of a township without paying just compensation. In holding that it could not, the Supreme Court stated in an opinion by Mr. Justice Sterrett, at pages 38 and 39, as follows:

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[10] Whether it be an easement or a mere license is uncertain.

[11] See pages 18 and 19 of the opinion of the Trial Judge which is incorporated herein.

[12] The Trial Judge's opinion refers to them as the Rural and Urban Rules, but for the purpose of disposing of defendant's motions, we will use its terminology.

"But conceding for the sake of argument, that the company has power under its charter to do the acts complained of in the bill and admitted by the demurrer, has it a right to proceed without first making or securing compensation to appellant? We think not. As owner of the land traversed by the public road, he has a right to use it and the land on which it is located for any purpose that will not impede or interfere with the public travel. By appropriating land for the specific purposes of a common highway, the public acquires a mere right of passage with the powers and privileges incident to such right. The fee still remains in the land owner notwithstanding the public have acquired a right to the free and uninterrupted use of the road for the purpose of passing and re-passing; and he may use the land for his own purposes in any way that is not inconsistent with the public easement. He may, for example, construct underneath the surface passage ways for water and other purposes, or appropriate the subjacent soil and minerals, if any, to any use he pleases, provided he does not interfere with the rights of the public. In other words, the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be free and open for public use as a highway. It is in view of this servitude that damages may be awarded to the landowner. Laying and maintaining a pipe line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, when the land was appropriated for the purpose of a public road. It is a burden, moreover, which to some extent, at least, abridges the rights of the landowner in

the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision requiring just compensation to be made for property taken, injured, or destroyed. (Const. Art. XVI, sect. 8.) In some cases it is possible the injury may be consequential as well as direct. The constitutional provision embraces both.

"In Bloomfield and Rochester Natural Gaslight Co. v. Calkins (62 N. Y. 386), it was held that a corporation organized under an Act, similar to ours, authorizing the formation of gaslight companies, has no authority to lay its pipes in a country highway without the consent of or without the appraisal and payment of compensation to the owner of the land. There is no reason why this should not be the rule with respect to public roads in the rural districts. As to streets and alleys in cities and boroughs, there are reasons why a different rule to some extent should prevail; *But that question is not now before us.*" (Emphasis supplied.)

The rule referred to by the defendant as the "township rule", after having been given birth in Sterling's appeal, *supra*, was later recognized in the case of *Duquesne Light Co. v. Duff*, 251 Pa. 607 (1916) and others.[13] In the Duquesne Light Co. case, the Court stated the issue at pages 608 and 609, as follows:

"The sole question in the case is whether an electric light company, having a contract with the commissioners of a township of the first class to light its highways, has the right to place its poles and wires upon the highways for such purpose without the consent of the abutting owners."

[13] *Bell Telephone Company of Pennsylvania v. North*, 24 D&C 2d 1 (1960).

In holding that it did not have any such right, the Supreme Court stated, at page 609, that:

"There is, however, no conflict in our decisions and the principle is announced and has been consistently adhered to that the only servitude imposed on land *appropriated* for a rural highway is the right to construct and maintain a safe and convenient roadway thereon, and that the public acquires a mere right of passage with the powers incident to such a right. *The owner in such cases retains the fee, and may use the land for any purpose not inconsistent with the easement acquired by the public. Damages are assessed solely on the ground that the easement thus acquired is the only servitude imposed on the land.* We have accordingly held that laying and maintaining a gas line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, where the land was appropriated for the purpose of a public road: Sterling's App., 111 Pa. 35. We applied the same principle in Penna. R. R. Co. v. Montgomery County Pass. Ry. Co., 167 Pa. 62, where we noted the distinction between the servitude imposed on land taken for a city street for which compensation need not be made or secured, and the additional burden imposed on a rural highway for which the abutting owner must be compensated; and held that until there was legislation authorizing it, a street railway could not be constructed upon *such highway without the consent of the abutting owners.*" (Emphasis supplied.)

And again at page 611:

"*When land is taken for a rural highway, the only servitude contemplated by the public authorities and*

the owner is the well understood burdens of a right of passage by the public with its incidental powers, and damages are awarded the owner for the imposition of that and no other servitude upon the land. The appropriation of land for a highway is a taking for a public use within the intendment of the Constitution, and if any additional servitude is created other than the one originally imposed it must be with the consent of the owner or for compensation made or secured to him'' (Emphasis supplied).

The illegitimate child born of the opinion in *Sterling's Appeal, supra,* was not to die a premature death or go unnoticed. Seven years after Mr. Justice Sterrett wrote his opinion, the Supreme Court had before it the case of *McDevitt vs. Peoples Natural Gas Co.,* 160 Pa. 367 (1894). In that case, the Court had to determine whether or not a natural gas company could install its pipe lines within the sidewalks in the City of Pittsburgh without permission of the landowners or after condemnation. In an opinion by Mr. Justice Williams, the Court held that it could. The Court held, at 160 Pa. 367, 373, 374, as follows:

"In land taken for a highway in the country, the easement acquired by the public is only for the purposes of a way over the surface. For all other purposes the land may be occupied by the owner so long as the public easement is not disturbed. We accordingly held in Sterling's Appeal, 111 Pa. 35, that the maintenance of a pipe line under such a highway imposed an additional servitude upon the land. It may be a very slight one, but to some extent it abridges the rights of the landowner in the soil. Our brother Sterrett said in that[14]

[14] As is so often the case, the person who conceived the rule denied its parentage. "Brother Sterrett", then Mr. Chief Justice Sterrett, dissented!! In *Sterling's Appeal,* the words of Mr. Justice Sterrett, "* * * but that ques-

(Footnote continued on following page)

case, 'As to streets and alleys in cities and boroughs, there are reasons why a different rule to some extent should prevail.' These reasons are obvious. The necessity for drainage; for a water supply; for gas for purposes of lighting; for natural, or fuel gas, for heat; for subways for telegraph and other wires; and for other urban necessities or conveniences, give to the municipality a control over the subsurface that the township has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land. But its situation may subject it to a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country. The city has the right to use the streets and alleys to whatever depth below the surface it may be desirable to go, for sewers, gas and water mains, and any other urban uses. In taking the streets for these necessary or desirable purposes it is acting not

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(Footnote continued from preceding page)

tion is not now before us", seems to have gone unnoticed. In *Lockhart vs. Craig St. Ry. Co.*, 139 Pa. 419 (1891), the Supreme Court affirmed *per curiam* the decision of the Allegheny County Common Pleas Court No. 1, which stated at page 424 as follows:

"So, the right to lay gas pipes in the streets, given by the legislature to municipal authorities, without allowing compensation, has been recognized by the courts and, while it has not been expressly ruled in Pennsylvania that I know of, Mr. Justice Sterrett, in Sterling's App., 111 Pa. 41, while deciding that a gas line was an additional burden which entitled the owner to damages in the country, said: 'As to the streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail.' Such has been taken to be the law in cities by common consent. I do not think that anyone ever heard of a suit in Pennsylvania to recover damages for injury done merely by running a gas pipe along the street in front of his premises under the municipal authority. So with water pipes, awning posts, fire plugs, and lamp posts. These all more or less impinge upon the absolute right of an owner of the soil, and are not necessary to accommodate public travel, or even consistent with the public right to an unobstructed passage way. And it may be now taken as settled that the owners' rights as to abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, as such as the public may from time to time require". (Emphasis supplied.)

for its own profit but for the public good. It is the representative of the inhabitants of the city, considering their health, their family comfort, and their business needs; and every lot owner shares in the benefits which such an appropriation of the streets and alleys confers. *If the city abridges his control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from an abundant water supply, from the general distribution of gas, and the like. The disturbance of the owner's control over the subsurface of the streets is in a legal sense an invasion of his rights, but it is damnum absque injuria"* (Emphasis supplied).

The same year as the Supreme Court decided the McDevitt case, it had before it the case of *Provost v. Water Co.*, 162 Pa. 275 (1894). Mr. Justice Mitchell, in his opinion for the Court stated that the opinion of Mr. Justice Williams in the McDevitt case was controlling. In the Provost case, the opinion of the Court states, at pages 278 and 279, as follows:

"* * * *That the right of the city to the use of the street for the purpose of urban servitudes, such as gas and water pipes, embraced the entire street, under the sidewalks as well as under the cartway;* and that the right of action of the abutting owner extended only to such damages as might be done in the laying of the pipe, interruption of access, etc.

"Under the permission of the city, our brother *Williams* says, the company 'might lawfully enter upon the streets to lay its pipes without liability to lot owners therefor. But it is contended that the sidewalks are not a part of the street, and that in laying its pipes

under the sidewalk the gas company has entered private property * * * This contention cannot be sustained. The street includes the whole of the land laid out for public use as a highway. The city determines how much of it shall be devoted to a cartway, and how much to a footway. The separation of one from the other by a line of curbing is for the security of that part of the public that passes along the streets on foot, and for no other purpose."

The *obiter dictum* of Mr. Justice Sterrett in *Sterling's Appeal, supra,* which found recognition as a rule of law in the *McDevitt* and *Provost* cases, *supra,* was to continue to grow even further. In the case of *Shawkey v. City of Pittsburgh,* 79 Pa. Super. 29 (1922), the Superior Court recognized and reaffirmed the rule when it cited as authority the holding in the *McDevitt* case. In that case the Superior Court held at page 79 Pa. Super. 31, 34, that:

"It is settled law, that abutting owners on streets and alleys in cities and boroughs have no claim for damages by reason of the appropriation of the surface or sub-surface for public improvements to the advantage and benefit of all the inhabitants".

The "city-borough rule" has been followed in other cases. In the recent case of *46 South 52nd Street Corp. v. Manlin,* 398 Pa. 304 (1960), the Supreme Court had the occasion to review the law dealing with streets and sidewalks in this Commonwealth. In that case, the Court stated, at page 312, that:

"While the easement acquired by the public in country roads is an easement of passage only, this is not true in Pennsylvania with respect to the public right in the streets of a city. These are regarded as in the exclusive possession of the municipality, which may

authorize the use of the sidewalk, as well as the street, for any public service, without further compensation to the abutting lot owners. *William Laubach & Sons v. Easton*, 347 Pa. 542, 32 A. 2d 881 (1943); *McDevitt v. Peoples Natural Gas Co.*, 160 Pa. 367, 28 Atl. 948 (1894)."

Accepting as we must that, from the decision in *Sterling's Appeal, supra*, there were born two separate and distinct rules, we are now confronted with the question of which is applicable to the facts of the instant case.

If we were merely to look to the fact that, at the time of the laying of the defendant's pipe line under the county road and in the plaintiff's property that the property was located in the then Borough of Monroeville, we would be prone to apply the "City-Borough" rule. However, this we cannot do. We are unable to close our eyes to the fact that when the plaintiffs acquired their property it was located at that time in the rural Township of Patton.

There appears to be no argument by either party[15], that, if the pipe line in the instant case had been installed three years previously, the plaintiff's decedent would have been entitled to compensation because the land would have been located in a "rural" township.

Conversely, if the land had always been located in an "urban" borough, then plaintiff would not be entitled to damages.

In the instant case, we are presented with a unique question; whether or not the vested rights of the property own-

[15] As stated by defendant on page 9 of its brief: "Conversely, our Supreme Court, in cases involving the installation of utility lines and facilities in township highways, such as *Sterling's Appeal*, 111 Pa. 35 and *Duquesne Light Co. v. Duff*, 251 Pa. 607, has held that such installations result in additional servitude on abutting property and entitle the abutting land owners to compensation therefor."

er, as recognized by the "township" rule can be divested without compensation by the mere changing of the corporate form of the municipality from a township to a borough. We think not! The constitutional provisions relative to the taking of property are too important to permit such tampering.

To permit such a taking of a private right in and to property would be contrary to the Constitutions of the United States and of this Commonwealth!

Defendant argues that now is the time for a change! It contends that there is no longer any basis for a valid distinction between the rules governing townships and cities and boroughs. In support of this proposition, they cite to us cases of *other* jurisdictions and text writers. The gist of these text writers' opinions seems to lie in the fact that society collectively, as represented by public utilities[16], has an expanding and, consequently, paramount right to the private property of individuals. To understand the reasoning of these text writers, we need only cite from defendant's brief as follows:

"I Elliott, *Roads and Streets* (4th ed.), Section 506 also sets forth the same rule (pp. 569-570):

> 'If we have not reasoned ill, a suburban servitude may not only be greatly augmented, but, in a measure transformed by the demand of the public welfare. This conclusion has for its ultimate foundation the old maxim "That regard be had for the public welfare, is the highest law," and it receives support from the principle that men are presumed when they do act to contemplate the natural consequences which may result. It is also true that the

[16] No reference is made to statutes enacted by elected representatives in a duly constituted legislature.

benefit which the owner of the servient estate receives from the increase in population and the building up of cities, far more than compensates him for the increased burden of the servitude which these things produce, so that he suffers no damages and without damages there can be no right of action.' "

Defendant further argues that our Supreme Court is ready to abolish the distinction in the two rules herein set forth and asks that we lead the way by declaring the township rule to be outmoded and thus discarded. In support of this proposition, defendant cites to us the case of *McCandless Township Appeal*, 409 Pa. 283 (1962), wherein the Court stated at pages 284 and 285 that:

"It is to be noted that in the case at bar, since the water lines were constructed entirely within the public streets (of a township) there were no damages involved."

The McCandless case again came before the Supreme Court for further consideration at 414 Pa. 168 (1964), and again the Court stated at page 170, footnote 2 that :

"Since the water lines were installed entirely within the confines of public highways (in a township) no right-of-way damages are involved."

We have examined both cases and find the references cited to us to be *obiter dicta* and, therefore, not controlling. Even after studying the paper books and records from both occasions that the cases were before the Supreme Court, we find no reference whatsoever to the question of damages for pipe lines laid in Township roads. Thus, our reason for designating the *McCandless* citations as *obiter dicta*. Moreover, those statements fly in the face of that Court's holding in *Sterling's Appeal, supra,* and *Duquesne Light*

Co., vs. Duff, supra. While we realize that there is much truth in the statement of Mr. Chief Justice Bell, *"Stare Decisis, Quo Vadis?"*[17], or *"Stare Decisis— * * * rest in peace."*[18], we are not ready to believe that the Supreme Court is willing to cast aside a rule of property law so long recognized in the judicial annals of this State, as well as in the Constitutions of the United States and this Commonwealth.

To give a subsidy by judicial decree to a profit corporation, albeit a public utility, and by so doing, to sanction a judicial condemnation of private property is repugnant to the Constitutions of the United States and of this State and to the laws enacted and treaties entered into pursuant thereto.

The Constitution of the United States of America provides as follows:

Amendment V:

"* * * nor shall private property be taken for public use without just compensation."

Amendment XIV:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

The Constitution of the Commonwealth of Pennsylvania, Article I, Section 10, provides as follows:

"Private property shall not be taken or applied to public use, without authority of law and without just compensation being first made or secured".

Article I, Section 11 provides:

"* * * every man for an injury done him in his lands * * * shall have a remedy by due course of law."

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[17] *Catherwood Trust*, 405 Pa. 61, 83 (1961).

[18] *Flagiello v. Pennsylvania Hospital*, 417 Pa. 468, 532 (1965).

Under either or both of the aforementioned Constitutions, the private property of a citizen cannot be taken without due process of law AND first having just compensation made or secured.

The Constitution of the United States, Article VI, Section 2, provides that:

> "This Constitution and the Laws of the United States which shall be made in Pursuance Thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Pursuant to the Constitution, the United States signed the United Nations Charter. Upon ratification by the Senate, it has the same force and effect as a Treaty and is, therefore, the "Supreme Law of the land."

In accordance with this Treaty, the General Assembly of the United Nations, on December 10, 1948, passed a "Universal Declaration of Human Rights". This Declaration has been held by our sister State of California in the case of *Sei Fujii v. State,* in 217 F. 2d 481 (1950) to have the same effect as the United Nations Charter and, thus is binding on all of the States. The Declaration provides as follows in Article 17(2) that:

> "2. No one shall be arbitrarily deprived of his property."

In light of the origin of the "city-borough" rule; in light of the Constitutions of the United States and of this Commonwealth, and in light of the Universal Declaration of Human Rights of the United Nations, if any rule is to be overruled and abandoned, we suggest that it be the one which considers that:

"The disturbance of the owners' control over the subsurface of the streets is in a legal sense an invasion of his rights, but it is *damnum absque injuria." (McDevitt v. Gas Co.)*

It is the opinion of this Court that:

1. The plaintiff's predecessors purchased their property when it was situate in the then rural Township of Patton and that they owned the fee of the property subject only to a right of passage in the public to use the county road;

2. That the property rights of plaintiff's predecessors vested at the time that they purchased the property and can not be divested by a mere change in the corporate form of the municipality from a township to a borough; and

3. That the defendant, when it constructed its pipe lines in the property of plaintiff's predecessors, was a bare trespasser, without a legal or equitable right and it must, therefore, answer to the plaintiff for damages.

This brings us to defendant's second issue raised by its motions, to-wit: Was the award of damages contrary to law?

Defendant alleges in his brief that the verdict was excessive and against the weight of the evidence. In support of this allegation, defendant attacks the plaintiff's expert witness who testified as to damages.

It is this Court's recollection, which is supported by the record, that the plaintiff's expert witness was properly qualified as such; that he gave his reasons as to why he thought that the value of the plaintiff's property would diminish as a result of the additional servitude which would be imposed thereon by defendant's pipe line, and that his opinion was that it would so diminish the value of plaintiff's property.

This testimony was evidence upon which the jury could, and conceivably did, base their award of damages. It was for the jury to believe or disbelieve the testimony of plaintiff's witness. Since the evidence is in the record, this Court will not disturb the verdict on the ground that the verdict was excessive or against the weight of the evidence on that ground.

Defendant cites the case of *Gilleland v. New York State Nat. Gas Corp.*, 399 Pa. 181 (1960) as controlling here. The Court agrees that this case would be controlling if the Trial Judge had permitted the case to go to the jury on the question of whether or not the defendant's pipeline were negligently installed. The Trial Court, however, did not submit that question to the jury. The jury had for its consideration whether or not damage was done to the value of plaintiff's property by the installation of the said pipeline and, if so, what reparation in damages should the plaintiff receive. For this reason, we hold that the *Gilleland* case, cited *supra*, therefore, is not controlling. The measure of damages was proper for the jury's consideration. We must assume that they were governed by the law given to them by the charge of the Court.

For the reasons set forth in this opinion and that of the Trial Judge, which we hereby affirm, it is our opinion that defendant's motions for a new trial and for judgment *n. o. v.* must be refused.

During the course of the trial, plaintiff and defendant entered into the following stipulation of record:

> "The Court: Let the record show that counsel for the defendant agrees that, if the jury returns a verdict in favor of the plaintiff, and under the law the plaintiff would be entitled to recover, then there should be

added to the amount returned by the jury an amount which would reflect detention damages at six per cent per annum from the date of taking to the date of the verdict.

"Mr. Eckert: The date the line was laid.

"The Court: The date the line was laid.

"Mr. Lamproplos: They wouldn't include that in their verdict. It can be added by the Court.

"The Court: Which can be computed by the Court and rendered in its judgment."

In accordance with this stipulation, the Court will amend the verdict by adding thereto the sum of $4,656.00 as interest, and judgment may be had on the verdict as amended upon payment of costs.

ORDER OF COURT

And now, to-wit Oct. 25, 1965 after consideration of argument in open Court and of brief of counsel, it is hereby ORDERED, ADJUDGED and AGREED that the defendant's motions for a new trial and for judgment *n. o. v.* be and are hereby refused.

It is further ORDERED, ADJUDGED and DECREED that the verdict be and is hereby amended by adding thereto the sum of $4,656.00 as interest, and judgment may be had on the verdict as amended upon payment of costs.

BY THE COURT,
R. H. S., JR.

Eo die, Exceptions noted and bill sealed.

RALPH H. SMITH, JR.,
Judge. (SEAL)

Appendix C

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

PITTSBURGH NATIONAL BANK, Executor of the Estate of Frank E. Mower, deceased,

v.

EQUITABLE GAS COMPANY, a corporation,

Appellant.

No. 111 March Term, 1966.

Appeal From the Judgment of the Court of Common Pleas of Allegheny County to No. 1173 April Term, 1961, Entered: December 22, 1965.

OPINION.

EAGEN, *J.* FILED: May 24, 1966.

In 1921, Frank E. Mower and Viola B. Mower, his wife, acquired the title to land abutting Beatty Road, an established public right of way, in Patton Township, Allegheny County. In 1951, the Mower property and the abutting public highway were incorporated into Monroeville Borough. In 1956, the defendant, a public utility company, laid a subsurface pipeline along the frontage of the Mower property for use in the distribution of natural gas to the public.

This action in trespass followed. It was commenced by the issuance of a summons. The Mowers were both named

party plaintiffs. Viola B. Mower then died, and the complaint named Frank E. Mower as plaintiff alone. Before trial, Frank Mower died, and the executor of his estate was substituted as party plaintiff.

The plaintiff has elected to consider the alleged trespass as an appropriation of a right of way for the pipeline, and to have the damages assessed as if the action were an eminent domain proceeding.

At trial, the plaintiff contended that the pipeline was laid beyond the confines of the public right of way and wholly within the boundaries of plaintiff's property. The trial court correctly ruled that this position was not sustained by the evidence and was in conflict with the pleaded cause of action, since the complaint alleged that the pipeline was installed "within the right of way * * * over Plaintiff's property for road purposes * * *."

The trial court then ruled as a matter of law that the owner of the property was entitled to compensation, even though the pipeline was laid wholly within the existing public right of way. It submitted to the jury a special interrogatory, to wit: What was the difference in the fair market value of the property before and after the pipeline was installed. The jury returned a special verdict in the sum of $9700.

Subsequently, the court *en banc* overruled the defendant's motion for judgment *non obstante veredicto* and amended the verdict to include detention damages in the sum of $4,656, and judgment was, therefore, entered in favor of the plaintiff in the total sum of $14,356. This appeal followed.

It has long been the law in this Commonwealth that an existing street or public road located in a city or borough

may be used for *any* public service without additional or further compensation due the abutting landowners. See, *46 S. 52nd St. Corp. v. Manlin,* 398 Pa. 304, 157 A. 2d 381 (1960), and *McDevitt v. Gas Co.,* 160 Pa. 367, 28 A. 948 (1894). However, a different rule has been applied if the street or public roadway was located within a township. See, *Sterling's Appeal,* 111 Pa. 35, 2 A. 105 (1885).

The court below, with these rules in mind, reasoned that since the road involved was situated in a township when it was initially established for public use, the public acquired only the right of travel thereon, and all other rights remained vested in the abutting landowners from whom the right of way was taken. It concluded that the change of government from a township to a borough did not enlarge the scope of the public easement, nor diminish the abutting landowners' rights, and for the new use or the taking the plaintiff was entitled to compensation under both the Pennsylvania and United States Constitutions.

The issue for decision is one of first impression in the appellate courts of Pennsylvania. It calls into focus the nature, wisdom and foundation of the pertinent law previously followed in this Commonwealth in determining if an additional servitude is imposed on an abutting landowner by the installation of facilities for the public benefit along a municipal public roadway.

The heart of the difficulty in the problem presented lies in the common law and early Pennsylvania view concerning condemnation of land by municipalities. Thereunder, the condemnor did not acquire a fee simple title in the land condemned in the absence of an express statutory provision that such was the case, but rather only the right to use and occupy the land for the purpose for which it was taken.

Title to the subsurface remained in the condemnee.[19] There is no public record to show why or when the roadway involved was established. However, in 1915, Allegheny County took over the road and it is still under its jurisdiction. Hence the law of condemnation as it existed prior to the Acts of 1937 and 1949 (see footnote 19) applies.

Since under the early law, the taking of land by a municipality for public road purposes created only an easement in the public to travel thereover, the changes in the modes of travel and commerce created legal problems in connection with the question as to what constituted an additional servitude on the already established public easement. Our courts were first confronted with this dilemna in the latter part of the 19th Century.

In an effort to resolve the difficulty, distinct rules evolved. In *Sterling's Appeal, supra,* this Court held that the laying of a pipeline under the surface of a public road in a township constituted the imposition of an additional servitude on the abutting land for which compensation must be paid. The Court specifically limited the ruling to roads located in townships, and refrained from indicating what its decision would be if the road were located in a city or borough.

A few years later in *McDevitt v. Gas Co., supra,* this Court refused to allow damages to abutting landowners where a gasline was laid underneath a city street. The Court emphasized that land located in a city is just as sacred as that in a rural area, but stated nonetheless that the location subjected it to a greater servitude without

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[19] However, the Act of July 2, 1937, P. L. 2793 §§ 1 & 2, 53 P. S. 1171 & 1172, provided a procedure to enable municipalities to acquire title in fee by eminent domain. Also, the Act of April 14, 1949, P. L. 442, § 1, 26, P. S. 201, provided thereafter that title in fee would be acquired under eminent domain by any subdivision of the Commonwealth unless prohibited by the ordinance or resolution of the condemnation. See, Ladner, Conveyancing in Penna. (3d ed. 1961), pages 68, 69.

additional compensation. It is significant to note that the Court did not, as some later authorities indicate, examine the use contemplated for a city street when the land is first condemned, as opposed to that envisioned for the establishment of a rural public road. Rather the Court looked to what was, at the time of the decision, considered a reasonable use for a city street and found that sewers, gas and water lines, and other typical urban uses were not such as to require the payment of additional compensation. Unfortunately, an additional unsound argument of "*damnum absque injuria*" was also included.

The distinct and different rules, governing the issue and recovery thus established, were preserved in *Duquesne Light Co. v. Duff*, 251 Pa. 607, 97 A. 82 (1916). However, therein the Court fell into the error which has precluded the future development of public uses of roads in township areas. In *Duquesne, supra,* the Court reasoned that when land for rural roads is taken originally, the only use contemplated is public travel, and, therefore, any other use requires payment of additional compensation. Such reasoning leaves the situation with grave logical inconsistencies. *McDevitt v. Gas Co., supra,* ruled that city streets are not burdened by the addition of public utilities. In view of the reasoning in *Duquesne, supra,* the question naturally arises: What about city streets which were acquired and established while the area was still in a township. This is the specific problem in this case. Admittedly, if *Duquesne, supra,* is followed to a logical conclusion, then additional compensation is recoverable herein. However, as noted before, *Duquesne's* conclusion was based on what we believe to be an incorrect premise.

There is a text book authority to the effect that in a case as here present, the test to be applied is the govern-

mental character of the area when the pipeline is laid, not the character when the road was established. See, I Nichols, Eminent Domain, 476 (2d ed. 1917). The rationale is that the citizens consent to the additional servitude when they change the governmental nature of the area. See, *Palmer v. Larchmont Electric Co.*, 6 App. Div. 12, 39 N. Y. Supp. 522 (1896), rev'd on other grounds, 158 N. Y. 231, 52 N. E. 1092 (1899). Also, a reading of all analogous Pennsylvania decisions clearly indicates that the political designation of the area involved when the use takes place is paramount in determining whether the act of the defendant imposes an additional servitude on the abutting land for which compensation is payable. For example, see, *Dempster v. United Traction Co.*, 205 Pa. 70, 54 A. 501 (1903).

The result reached in *Sterling's Appeal, supra,* Duquesne, *supra,* and kindred cases may have been correct at the time these decisions were rendered. Being far removed from the scene, it is now impossible for us to make a correct assessment. However, it is clear that some of these decisions were based, at least in part, on the erroneous assumption that what was contemplated when rural roads were established was something different than when a city road was involved. On the contrary, when any public road is established, it is clearly for the purpose *of public travel and commerce.* When roads were established for public use generations ago, it is hard to believe that the multiple uses now made thereof were envisioned or considered. See, Note, 96 U. of Pa. L. Rev. 256 (1947).

As the means and modes of public commerce increase, what at one time would have been considered a burden on the abutting landowner is no longer so. The same holds true with respect to easements appurtenant as it does to

public easements, such as are here involved. Evolutionary changes must be considered in determining whether a burden is imposed on the servient tenement. See, Restatement, Property § 479 (1944).

We believe it is common knowledge that the level of commerce in our townships has *at least* reached that existing in our cities and boroughs in 1894, the year *McDevitt, supra,* was decided. We are, therefore, of the opinion that there is now no need to apply a different rule in determining what constitutes a burden on a township road, as opposed to a city or borough street. The reasons for the distinction have disappeared.

The township and so-called rural area of today are a far cry from the backwoods they were once pictured. Gas heat and electric light, which in the day of *Sterling's Appeal, supra,* were virtually unheard of outside of the city, are today commonplace in virtually all rural homes. The rural and suburban dweller has come to accept these conveniences as a way of life. This development makes the carriage of these items along our roads a part of the main stream of commerce which is thus included within the original public easement.

This Court has recognized this development in a number of cases involving township roads, wherein it has permitted the installation of extensive drainage facilities without additional compensation being paid to the subsurface owners. See, *Rapetta Appeal,* 405 Pa. 284, 175 A. 2d 77 (1961), and *Brewer v. Commonwealth,* 345 Pa. 144, 27 A. 2d 53 (1942). We have also indicated by way of dicta in two recent opinions that the old distinction between township and city roads is no longer valid. See, *McCandless Township Appeal,* 409 Pa. 283, 186 A. 2d 393 (1962), and *McCandless Township Appeal,* 414 Pa. 168, 199 A. 2d 438

(1964). The time has now arrived for that dicta to become an absolute ruling.[20]

We, therefore, hold that the facts in this case do not establish the imposition of an additional burden on the servient land.

Since our decision concerns only the degree of use to which an already existing public easement may be put, the constitutional questions raised here and below are not relevant.

Judgment reversed and herewith entered for the defendant.

Mr. Chief Justice Bell and Mr. Justice Cohen concur in the result.

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[20] We do not say that it is no longer possible to burden the abutting land by a new use. (See *e.g., Shinsel v. Bell Telephone Co.*, 31 Pa. Superior Ct. 221 (1906).) If a use obstructs the abutting land or is of a new nature not in accord with the main stream of today's commerce, it will still be held a violation of the landowner's rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 706

THE PITTSBURGH NATIONAL BANK, Executor of the Estate of Frank E. Mower, Deceased, Petitioner

v.

EQUITABLE GAS COMPANY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 706

THE PITTSBURGH NATIONAL BANK, Executor of the Estate of Frank E. Mower, Deceased, Petitioner

v.

EQUITABLE GAS COMPANY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

Petitioner's reference to the official and unofficial reports of the opinions delivered in the Courts below is not correct when it states that the opinion of the court en banc of the Court of Common Pleas of Allegheny County, Pennsylvania, is reported at 114 P.L.J.[1] 1. It is only the opinion of the trial judge that is reported at 114 P.L.J. 1. The opinion of the court en banc is not reported.

1. Pittsburgh Legal Journal.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3). The petitioner contends that the 5th and 14th Amendments to the Constitution of the United States are involved in the instant case. Petitioner asserts that its decedent's property was taken without just compensation or due process of law because the Supreme Court of Pennsylvania reversed a former decision which made a distinction between urban and rural highways with respect to the extent of the public easement in highways and held, as do the vast majority of the States, that the installation of a gas pipe line or other common public utility facility in any public highway does not impose an additional servitude on an abutting property and entitle the owner of such a property to compensation.

QUESTIONS PRESENTED

1. Does the law of a State that the laying of a common utility, such as a gas line, wholly within a public highway in a borough, does not entitle an abutting property owner to damages, violate the United States Constitution?

2. Is the judgment of the State court based upon an adequate and independent nonfederal ground where the State law is that the laying of a common utility, such as a gas line, wholly within a public highway in a borough, does not entitle an abutting property owner to damages and the gas line in question was in fact laid wholly within a public highway in a borough?

3. Is the United States Constitution violated where a State court, in view of the fact that present-day townships and so-called rural areas are a far cry from the backwoods they were once pictured and modern conveniences, such as gas heat and electric light, are today commonplace and accepted as a way of life in virtually all rural homes, overrules an old distinction between township highways and city and borough highways with respect to the extent or scope of the public easement in highways and declares that the same rule, which theretofore applied to city and borough highways, shall apply to all highways in the State?

STATEMENT OF THE CASE

The respondent gas company, a public utility, in 1956 laid a gas distribution pipe line wholly within the confines of Beatty Road, a public highway, in Monroeville Borough, Allegheny County, Pennsylvania (R. 35a, 87a, 92a, 96a, 100a, 104a, 139a, 142a[2]). The pipe line was laid entirely within the lines of the highway, along the frontage of the property of plaintiff's decedent (hereinafter called "Mower property") and *no part of the Mower property was physically taken* (R. 20a, 34a, 57a, 73a-78a, 96a, 100a, 104a, 123a, 125a, 127a, 129a, 131a). The pipe line, laid within the right of way of the public highway along the Mower property, is part of a gas distribution pipe line laid from a gas pipe line of Texas Eastern Corporation in Salem Township, Westmoreland County, Pennsylvania, to Peterman's Corner in Penn Township (now Penn Hills), Allegheny County, Pennsylvania, in order to furnish an adequate supply of gas to the eastern side of respondent's distribution system, including the distribution system for the residents of Monroeville Borough, one of the fastest growing communities in Allegheny County,[3] and adjacent communities (R. 38a, 48a-49a, 62a-63a, 143a).

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2. Record references followed by "a" are to the Record printed for the Supreme Court of Pennsylvania. Those followed by "b" are to the Supplemental Record of Appellee in that Court. Respondent cannot give record references to the Record, as renumbered and enlarged, filed with this Court since it was not furnished with a copy of such Record.

3. Contrary to the impression petitioner tries to create, Monroeville is urban and not rural and also the

When this pipe line was laid the Mower property was owned by Frank E. Mower, the decedent, and his wife, as tenants by the entireties (R. 16a, 138a) and that property and the public highway on which it abutted, Beatty Road, were located in Monroeville, which was then a borough, having been incorporated as such on January 25, 1951, almost five years before the pipe line was laid, by an order of the Court of Quarter Sessions of Allegheny County (R. 30a, 89a-90a, 138a). Prior to 1951, and in 1921 when Frank E. Mower and his wife acquired title to the property, the Mower property and the portion of Beatty Road on which it fronted were located in Patton Township.

There is no public record or other evidence to show when or how Beatty Road was established. There is a proceeding in the Court of Quarter Sessions of Allegheny County under which Allegheny County took over Beatty Road for maintenance (R. 133a). It is clear that Beatty Road has been in existence and a public highway from time immemorial and that, at least since February 27, 1915, to the present time, it has been and is a public highway under the control and care of Allegheny County (R. 141a-142a).

Because the pipe line was laid in a public highway located in a borough and it has been the law in Pennsyl-

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fastest growing community in Allegheny County. United States Census figures show that its population grew from 7,841 in 1950 (the last year in which the area was Patton Township) to 22,246 in 1960. In the past twenty-five years innumerable plans of lots have been laid out and developed and extensive industrial and commercial establishments have been located and built in that community.

vania at least since 1894, as laid down in the leading case of *McDevitt v. The People's Natural Gas Co.*, 160 Pa. 367, 28 A. 948, that a gas company may install its pipe lines in city and borough highways without the payment of any compensation to abutting property owners because the pipe lines do not constitute an additional servitude on the abutting properties, the respondent gas company did not institute any condemnation proceedings or offer to pay any damages to the Mowers and refused to accede to the demand of the Mowers for the payment of damages (R. 5a-6a, 11a, 45a-48a). The Mowers, therefore, commenced this action of trespass against the respondent.[4]

At the trial, petitioner elected to consider the alleged trespass as an appropriation of a right of way for the pipe line and to have the damages determined as if the suit were an eminent domain proceeding (R. 63a, 143a).

The trial judge recognized that the real issue in the case at bar was an issue of law for the court but decided to reserve decision, instead of ruling forthwith,

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4. The suit was commenced by Frank E. Mower and Viola B. Mower, his wife, by a praecipe for a writ of summons (R. 1a). Viola B. Mower died before a complaint was filed (R. 5a). A complaint was thereafter filed by Frank E. Mower alone (R. 3a) and the caption of the case was amended by removing the wife plaintiff as a party to the suit (R. 1a). Frank E. Mower died a little more than a year after the complaint was filed (R. 13a). More than two years after his death and about a month before the trial, the petitioner was substituted as the party plaintiff (R. 13a).

on respondent's motion for a directed verdict.[5] Accordingly, the trial judge submitted to the jury only a special interrogatory, namely, if it should be decided, as a matter of law, that petitioner was entitled to damages what was the amount of the difference, if any, between the fair market value of the property before and after the pipe line was laid (R. 92a, 103a, 108a-111a, 137a). The jury returned a special verdict that the amount of that difference was $9,700 (R. 137a).

Petitioner tries to mislead this Court when it states (Petition, p. 4) that "There was no dispute among the real estate experts for both parties as to the fact that there was actual money damage to decedent" in this case. The petitioner deliberately ignores and conceals from this Court the essential fact that the opinions of respondent's experts as to possible damage were expressly predicated on the assumption that, as a matter of law, an additional servitude was imposed upon the petitioner's property by the gas line and that any such opinion was expressly given subject to the decision by the court on the question of whether any additional servitude was imposed by the gas line (R. 7b). It has always been respondent's position that the plaintiff's property was not damaged whatever by the laying of the gas line wholly within the public highway and that the plaintiff was not entitled to recover anything (R. 10a, 11a, 102a, 116a, 137a, 168a).

The trial judge decided that the petitioner was entitled to recover compensation, even though the public highway was located in a borough when the pipe was

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5. Sometimes called, under Pennsylvania procedure, written point for binding instructions.

laid entirely within the confines of the highway, because, when the public highway was established and when petitioner's decedent acquired the property, the highway and the property were located in a township (R. 161a). The trial judge incorrectly reasoned, in the face of persuasive and weighty authority that there can be no vested right, in the constitutional sense, to a continuance of an existing status quo or general law,[6] that petitioner's decedent had a vested right to the continuance of the so-called "township rule", enunciated in *Sterling's Appeal,* 111 Pa. 35, 38-39, 2 A. 105, which could not be, in any manner, taken away without infringement of the 5th and 14th Amendments to the Constitution of the United States (R. 161a). The trial judge entered an order that the special verdict be filed of record and that judgment be entered thereon (R. 166a-167a). The respondent thereupon, in accordance with applicable Pennsylvania procedure, filed a motion for judgment non obstante verdicto (R. 168a).

A court en banc, consisting of the trial judge and another judge of the Court of Common Pleas of Allegheny County, adopted the reasoning of the trial judge and refused respondent's motion for judgment n.o.v. (R. 183a-184a, 190a, 192a-193a). Judgment was entered against the respondent in the amount of the special verdict, as amended by the court en banc to add detention money (R. 2a-3a, 192a-193a). The appeal by respondent to the Supreme Court of Pennsylvania followed.

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6. See: *North American Co. v. S.E.C.* 327 U.S. 686, 708; *United States v. Philadelphia,* 140 F. 2d 406, 408 (C.C.A. 3); *Catherwood Trust,* 405 Pa. 61, 70, 173 A. 2d 86; 2 Cooley *Constitutional Limitations* (8th ed.), p. 749; 16 Am. Jur. 2d, p. 762.

The Supreme Court of Pennsylvania after the case was fully briefed and argued by counsel for the parties,[7] unanimously reversed the judgment of the trial court and entered judgment for the defendant. It appears from the exemplary opinion written by Mr. Justice Eagen that five members of the Supreme Court of Pennsylvania decided to follow the course, often followed by this Court,[8] of refusing to perpetuate an obsolete rule by blind adherence to the principle of stare decisis and, instead, molding the law to fit modernized living conditions. Accordingly, it was held that the time had come for Pennsylvania to join the vast majority of the other States which hold that all public highways may be used for modern public uses which have become commonplace by the evolution of civilization, even though such uses were not in existence and therefore not in contemplation at the time the highways were established. The other two members of the Supreme Court of Pennsylvania, concurring in the result, apparently recognized that the judgment of the Court is required by the preexisting State law.

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7. Several amicus curiae filed briefs urging the Court to overrule the decision relating to township roads in *Sterling's Appeal,* 111 Pa. 35, 2 A. 105.

8. See: *Brown v. Board of Education of Topeka,* 347 U.S. 483, 492-495; *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 74. Also see: dissenting opinion of Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406.

SUMMARY OF ARGUMENT

The State Court interpreted the law of the State and determined, like the vast majority of other state courts, that the installation of common utility lines in a public highway does not impose an additional servitude on abutting properties and entitle their owners to additional compensation. It is well settled that it is for the state courts to declare what the state law is, particularly with respect to real property rights. *United States v. Fox,* 94 U.S. 315, 320; *Sauer v. New York,* 206 U.S. 536, 548; *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 680; *United States v. Burnison,* 339 U.S. 87, 91. A state court may overrule a prior decision by it and in doing so may follow the doctrine that the revised law shall apply to the instant case before it. Such action by a state court does not violate the Federal Constitution. *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 450; *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673, 680; *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 365.

Accordingly, the Supreme Court of Pennsylvania was correct in its decision on the merits, the State Court decision is based on an adequate nonfederal ground, there was no denial of due process guaranteed by the Federal Constitution, and there is no federal question involved in the case at bar.

Certiorari should therefore be denied.

ARGUMENT

A perusal of the opinion of the Supreme Court of Pennsylvania abundantly demonstrates that it decided purely a matter of state law regarding the uses to which an already existing public highway easement in that State may be put to provide necessary and essential public utility services to the public. It is also clear, from the concurrence of two of the members of the State court, that the result reached in the instant case is and may be adequately supported on the status of the State law as of the time when respondent's pipe line was laid and without overruling any prior State precedent. Such questions are and must be for the final determination of the State court. That the State court only decided a question of State law and was not required to and did not reach any Federal question is plain from the opinion of Mr. Justice Eagen for the Supreme Court of Pennsylvania. Speaking for that Court, he declared (Petition, Appendix C, p. 61):

> "Since our decision concerns only the degree of use to which an already existing public easement may be put, the constitutional questions raised here and below are not relevant."

It is too well settled to justify extended discussion that the courts of a state have the power to interpret and declare the laws of the state and that where, as here, a state court decision is and may be based upon a nonfederal ground and the nonfederal ground is adequate to support the judgment it is not open to review by this Court. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164-166; *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680; *Fox Film Corp. v. Muller*, 296

U.S. 207, 210; *Moffett v. Commerce Trust Co.*, 329 U.S. 669; *Superior Court of California v. Lillefloren*, 335 U.S. 906.

Moreover, the decision of the Supreme Court of Pennsylvania is correct and in full accord with the decisions of the vast majority of the other State courts which have considered and passed upon the same question involved in this case. The vast majority of the courts have held that public highways were taken or dedicated for all reasonable means of transportation of persons and commodities which the advance of civilization may evolve and that the servitude imposed by highway easements expands to accommodate improvements in methods and means used to transport passengers and commodities, without any additional compensation to the owners of the abutting properties who own the fee subject to the highway easement. These courts have correctly observed that all damages for such uses were included in the assessment of compensation for the original laying out of the highway. For example, see *United States v. Oklahoma Gas Co.*, 318 U.S. 206, 209; *Padgett v. Arkansas Power & Light Co.*, 226 Ark. 409, 413-414, 290 S.W. 2d 426; *Sears v. Crocker*, 184 Mass. 586, 587-588, 69 N.E. 327; *Peabody v. Boston*, 220 Mass. 376, 377-378, 107 N.E. 952; *Smith v. The Central Power Co.*, 103 Ohio St. 681, 137 N.E. 159; *State ex rel. York v. Walla Walla County*, 28 Wash. 2d 891, 903, 184 P. 2d 577; *Hardman v. Cabot*, 60 W. Va. 664, 667-669, 55 S.E. 756; 3 Nichols, *Eminent Domain* (3rd ed.) § 10.1 (p. 342 et seq.) and cases there cited; 1 Elliott, *Roads and Streets* (4th ed.) § 502 (p. 565); 25 Am. Jur., p. 462.

An excellent, but lengthy, exposition of this principle is the concurring opinion of the Chief Justice of the Ohio Supreme Court in *Smith v. The Central Power Co., supra,* at 691-695. The principle is also logically, but more concisely, set forth in the opinion of Chief Justice Rugg for the Supreme Judicial Court of Massachusetts in *Peabody v. Boston, loc. cit. supra,* thusly:

> "The public acquired the right to use the land, within the boundaries of the taking of the easement of travel, for all reasonable means of transportation for persons and commodities which the advance of civilization may render suitable for a highway. The fee of the land remains in the landowner, who may use it in any reasonable way not inconsistent with the paramount right of the public easement which is coextensive with the limits of the highway. When the needs of the public for the purpose of travel increase, they are superior and the landowner must withdraw even to the extent of being quite excluded. (Citations) . . . Included in the same public right is the subterranean use of the streets for travel. *Sears v. Crocker,* 184 Mass. 586. All damages for these and such like uses were included in the assessment of compensation for the original laying out of the highway. No constitutional right of the abutting landowner is invaded by the exercise of the rights acquired by the public but suffered to lie dormant for a time."

An analysis of the petition for writ of certiorari filed in the case at bar shows that the position of the petitioner is that its decedent had a property right in a court decision or prior precedent of State law which

could not be overruled without violating the Constitution of the United States. The petitioner contends that state court decisions should and may make law for the future only. The mere statement of this argument plainly demonstrates that it is wrong, wholly without merit and specious. On the contrary, it is a long established prineiple of law that *stare decisis* is not an inexorable command and that courts, like this Court, may and should overrule an earlier decision when improved living conditions or other changes wrought by an evolving society render a former decision incongruous. What Mr. Justice Holmes observed in his dissenting opinion in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 370, is peculiarly apposite (p. 372):

> "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."

In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, this Court by Mr. Chief Justice Taft, said (p. 450):

> "The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."

The applicable principle was stated by Mr. Justice Brandeis for this Court in *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, thus (p. 680):

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's

power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court."

And in a note to the opinion Mr. Justice Brandeis observed (p. 681):

> "The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties even though parties may have acted to their prejudice on the faith of the earlier decisions."

In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, this Court, in an opinion by Mr. Justice Cardozo, declared (pp. 364-365):

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Co. v.*

Flanagan, supra), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. [Citations] On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. [Citations] The alternative is the same whether the subject of the new decision is common law (*Tidal Oil v. Flanagan, supra*) or statute. [Citations] The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature."

Singularly appropriate to the instant case is the following holding by this Court in *Sauer v. New York,* 206 U.S. 536 at 548:

"The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, and the decisions have been conflicting, and often in the same State irreconcilable in principle. The courts have modified or overruled their own decisions, and each State has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and im-

pose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the Fourteenth Amendment is shown."

The cases which the petitioner cites to support its contention that the alleged retroactive enlargement of the public easement in a highway infringes the Federal Constitution are plainly distinguishable and inapposite.

In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, the defendant coal company owned certain coal and the right to mine all of it without any liability for surface damage. The Pennsylvania legislature, claiming the right under the police power, enacted a statute which forbade any coal owner from mining his coal in such way as to cause the subsidence of certain surface structures. It was clear and admitted that the statute as applied to that case destroyed existing rights of property and contract, which is the antithesis of the case at bar. This Court held that the regulation of the coal company's property went too far and, therefore, constituted a taking without compensation contrary to the Federal Constitution. However, it is significant that this Court there recognized (p. 413) that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

United States v. Causby, 328 U.S. 256 and *Griggs v. Allegheny County,* 369 U.S. 84, only hold that the operation of airplanes in taking off and landing at an airport by low flights over adjacent or nearby property so as to

make the property unusable as a chicken farm or a private residence because of the resulting noise, vibration and danger constituted the taking of an air easement over such property for which just compensation must be paid. No easement whatever for low airplane flights over the plaintiff's property was already in existence in those cases; whereas, in the case at bar, the easement for a public highway in front of plaintiff's property had existed for innumerable years before the gas line was laid in that public highway.

The *Griggs* case does not hold, as petitioner states (Petition, p. 7), that "[W]hile concededly the state at one time acquired some rights to use the surface of petitioner's land 'by constitutional standards it did not acquire enough' to permit use of the sub-surface without payment of compensation therefor."

Petitioner's position in the instant case is that ownership of the land extends from the surface downwards to the center of the earth and upwards indefinitely to the skies and that, therefore, even if an easement for a highway exists over the surface of the land, no use of any area below or above that surface may be made without the payment of additional compensation. If petitioner's position were correct, travel through the air over this country could only have been accomplished by the appropriation of an air easement, with the payment of compensation, over every square inch of land in the 50 states of this nation. If petitioner were right, the Congressional enactments pursuant to which the United States declared that it possesses and exercises sovereignty over the nation's air space and granted to any citizen freedom to travel through the navigable air space, infringe upon

the Constitution of the United States, because no compensation was provided or paid for the appropriation of such airspace. Fortunately, for the progress and advancement of this Country that position is not recognized. On the contrary, this Court, in *United States v. Causby,* 328 U.S. 256, rejected any such thought, saying (pp. 260-261):

> "It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — *Cujus est solum ejus est usque ad coelum.* But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."

Petitioner tries to create the impression (Petition, pp. 8-9) that what was done by the Supreme Court of Pennsylvania in the instant case is novel and startling and a major departure from accepted constitutional doctrine. Petitioner proclaims that the decision of the Court below will "be widely practiced" and that a proverbial Pandora's box will be unlocked, unless this Court intervenes. It is manifest, from what has been set forth in this brief, that the decision of the Supreme Court of Pennsylvania is not novel or startling and that, on the contrary, it is in accord with logical and sound decisions of other courts extending back more than a half century.

Petitioner alludes to the beautification proposals being urged upon Congress and conjectures that to accomplish them it might be decided that utility lines and the like should be removed from the surface of the countryside and should be buried beneath the surface. Petitioner theorizes that if national beautification is thus accomplished it will be at the expense of "a relatively few property holders rather than the government bodies or utility companies" who may pass the cost on to the general public. This attempted illustration is absurd and specious. If Congress decides that overhead lines strung along public highways, established by prior condemnation or dedication, should be removed and relocated beneath the surface of such highways, no additional servitude will be imposed on the highways and the abutting properties. Therefore, there would be no reason to justify the payment of additional damages to abutting property owners if wires which had been above the surface of a public highway were placed beneath it. Any allowance of compensation in such circumstances, would be plainly unjust and an unfair toll. The dire consequences and perils which petitioner conjures have not occurred despite the fact that the principle followed by the Supreme Court of Pennsylvania in this case has been the law in other States for over a half century. Any such consequences and perils are a mere figment of petitioner's imagination to intimidate this Court.

The law, we submit, is not permanently inflexible as petitioner would have it declared. As demonstrated by the authorities cited in this brief, the law is flexible and progressive and adapts itself to new conditions and concepts created by the progress of society.

In conclusion, it is respectfully submitted that the decision of the Supreme Court of Pennsylvania that the public easement of a highway includes every reasonable means for the conveyance of persons, the transmission of intelligence and the transportation of commodities which the advance of civilization may render suitable for a highway is correct; that no constitutional right of the petitioner has been violated; that the decision of the Court below is adequately supported by nonfederal grounds; that the Court below has not decided a federal question of substance not heretofore determined by this Court or decided it in a way not in accord with applicable decisions of this Court; and that no federal question is involved in the case at bar. Accordingly, the judgment of the Supreme Court of Pennsylvania should not be disturbed. There is nothing in the instant case that justifies the granting of a writ of certiorari. *Certiorari should, therefore, be denied.*

Respectfully submitted,

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OCTOBER TERM, 1966

No. 706

THE PITTSBURGH NATIONAL BANK,
Executor of the Estate of
Frank E. Mower, deceased,
Petitioner,

vs.

EQUITABLE GAS COMPANY,
a corporation.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I.

Respondent's "Questions Presented," as well as the remainder of its brief in opposition, misconceive the issue presented in this case and raised in the petition for a writ of certiorari. In its first two "questions presented" respondent raises the question whether an "abutting property owner" is entitled to damages when a gas pipeline is laid "wholly within a public highway." This might have been the issue had the state originally acquired a fee interest in the land on which Beatty Road lies. But it is conceded that it did not do so. To the contrary, the state's

right is only the right of an easement holder. The land on which the Beatty Road easement lies is petitioner's decedent's land. The gas pipeline in question was not laid "wholly within a public highway"—it was laid on petitioner's decedent's land and the state's easement concededly did not at the time it was acquired give the right to lay the pipeline. Such a right did not exist until the decision of the court below, which, for the first time, held that the state's easement had grown to include rights not acquired or paid for when the easement was initially established.

II.

Respondent attempts to pass off petitioner's constitutional claim as amounting to an assertion of vested rights in a rule of law represented by prior decisions of the Supreme Court of Pennsylvania overruled in the instant case. Petitioner's case has no such foundation. Rather, it rests on the principle that the state cannot, by overruling past decisions of its courts or otherwise, occupy and use privately-owned land for which it has not paid just compensation. And this principle cannot be compromised merely because "new conditions and concepts created by the progress of society" make it desirable that the state or its agent occupy and use private property.

This principle is sustained by the cases cited and relied on by respondent for the undisputed but irrelevant proposition that retroactive overruling of old cases by a state court does not per se violate the federal constitution.

Thus, in *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930), quoted at length by respondent at pages 14-15 of its Brief in Opposition, this Court held that a state court could not, consistent with the federal constitution, bar a suit to enjoin collection of taxes on the ground of failure to exhaust administrative remedies when past state decisions had made clear that the administrative remedy was not available. The court held that the retroactive

application of the new doctrine deprived the suitor of property without due process of law.

In *Great Northern Ry. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932), this Court observed that the case did not involve retroactive application so as to impair previously existing rights; the Court made clear that if the opposite had been true it would have invalidated the retroactive application. Similarly, in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), retroactive application of the challenged decision did not interfere with existing rights and the Court's opinion states only that a constitutional claim may not be based on the "*mere* fact of retroactivity." And in *Sauer v. City of New York*, 206 U.S. 536 (1907), the Court's decision rests on the fact that no property rights were violated since petitioner *"never owned the easements which he claimed."* (At p. 548, Emphasis supplied.) [1]

In short, the cases cited by respondent are entirely consistent with the principle asserted by petitioner — that a state may not by judicial decision retroactively expand its interest in private property to include rights not previously acquired or paid for.[2] Any expansion of a state's rights in private property must be accomplished by payment of just compensation to the deprived property owner.

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[1] The additional cases cited in this section of respondent's brief (*United States v. Fox*, 94 U.S. 315 (1886); *United States v. Burnison*, 339 U.S. 87 (1950)) stand only for the proposition that state courts are generally empowered to formulate state real property law.

[2] Respondent attempts unsuccessfully to distinguish the cases cited in the petition. It describes *Pennsylvania Coal Co. v. Mahon* as involving the destruction of existing property rights, but it is difficult to perceive how that makes it different from the present case. *United States v. Causby* and *Griggs v. Allegheny County* are explained on the ground that the state had no easement over the properties there involved. But in the present case the state had no easement in or right to invade the land in which the gas pipeline was laid.

This is precisely what the Supreme Court of Pennsylvania denied petitioner in this case.

Petitioner respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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